Supreme Court, U.S.
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80-1075

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY JENKINS,
PETITIONER,

v.

STATE OF SOUTH CAROLINA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of South Carolina erred by failing to reverse Petitioner's conviction where Petitioner was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel by virtue of the trial court's denial of a continuance and by the resultant three-day period between indictment and trial?

II. Whether the Supreme Court of South Carolina erred in failing to reverse Petitioner's conviction where Petitioner was denied a full *voir dire* and continuance in the face of pervasive and highly prejudicial pretrial publicity?

TABLE OF CONTENTS

	Page
Questions Presented for Review	I
Opinion Below	1
Jurisdiction	2
Constitutional Provisions	2
Proceedings Below	2
Statement of the Case	4
Reasons for Granting the Writ	7
A. The Failure of the Supreme Court of South Carolina To Reverse Petitioner's Conviction Where the Defense Was Given Inadequate Time To Prepare Is Contrary to the Provisions of the Sixth Amendment's Guaranty to Effective Assistance of Counsel and to the Fourteenth Amendment Due Process Guaranty	9
B. The Failure of the Supreme Court of South Carolina To Reverse Petitioner's Conviction When Petitioner Was Denied a Trial by a Fair and Impartial Jury Is Contrary to the Provisions of the Due Process Clause of the Fourteenth Amendment	13
Conclusion	16
Appendix A: Memorandum Opinion of the Supreme Court of South Carolina	A-1
Appendix B: Constitutional Provisions	B-1

TABLE OF AUTHORITIES

Cases

Dennis v. *United States*, 339 U.S. 162 (1950)	15
Irvin v. *Dowd*, 366 U.S. 717 (1961)	13
Murphy v. *Florida*, 421 U.S. 795 (1975)	15

PREVIOUS PAGE WAS BLANK

Page

Powell v. *Alabama*, 287 U.S. 45 (1932) 9
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 14
Silverthorne v. *United States*, 400 F.2d 627 (9th Cir. 1968) 15
State v. *Greene*, 255 S.C. 548, 180 S.E.2d 179 (1971) 9
State v. *Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950) ... 9
Sykes v. *Virginia*, 364 F.2d 314 (4th Cir. 1966) 10
Ungar v. *Sarafite*, 376 U.S. 575 (1964) 10
United States v. *Uptain*, 531 F.2d 1281 (5th Cir. 1976) ... 10

Statutory Cases

U.S. Const. amend. VI 2, 9
amend. XIV 2, 9

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Petitioner, Leroy Jenkins, respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the Supreme Court of South Carolina filed September 25, 1980.

Opinion Below

The memorandum opinion of the Supreme Court of South Carolina has not yet been published in official reports. A copy of the opinion is attached hereto as Appendix A (A-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(3) to review the final judgment of the highest court of a State by writ of certiorari.

Constitutional Provisions

The following United States Constitutional Provisions are involved: U.S. Const. Amend. VI and XIV. The text of those provisions is attached hereto as Appendix B. (B-1).

Proceedings Below

On April 17, 1979, Petitioner, Leroy Jenkins, was arrested pursuant to a warrant charging him with three misdemeanor violations: two charges of conspiracy to commit arson and one charge of conspiracy to commit assault and battery of a high and aggravated nature. A preliminary hearing was held before the Honorable Charles E. Henderson, Magistrate of Greenwood County, on May 9, 1979. The magistrate ruled that probable cause had been shown on all three counts and that said counts would be sent on to the Grand Jury.

On May 14, 1979, Petitioner was charged by the Greenwood County, South Carolina Grand Jury in a four count indictment alleging two counts of conspiracy to commit arson and two counts of conspiracy to commit assault and battery of a high and aggravated nature. The trial commenced on May 17, 1979, three days after the indictment was returned, in the Court of General Sessions of Greenwood County, the Honorable James H. Moore presiding. The defense contended that Petitioner was entrapped into making incriminating statements which were tape recorded and that he had no intention to either engage in any of the conspiracies or to commit any of the crimes allegedly involved in the conspiracies. On May 22, 1979, the jury found Petitioner guilty on each of the four counts of the indictment.

Petitioner was sentenced by Judge Moore to a term of imprisonment of five years on each count with each term to run consecutive to each other. Upon the service of three years of each coun the remaining two years would be suspended and the Petitioner placed on a period of five years probation.

After conviction and sentence, Petitioner timely filed a Notice of Intention to Appeal and moved for bail pending appeal. Judge Moore denied bail, and Petitioner subsequently filed a Notice of Motion and a Motion for Bond in the Supreme Court of South Carolina seeking bail pending appeal. Said motion was the subject of brief oral argument before the State Supreme Court on June 11, 1979, and was denied by the Court without opinion on June 12, 1979.

Petitioner thereafter filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina, pursuant to 28 U.S.C. §2241, seeking bail pending appeal to the Supreme Court of South Carolina and the federal courts, if such further appeal became necessary. In an order filed September 28, 1979, the Honorable J. Robert Martin, Jr., Chief Judge of the United States District Court, dismissed the Petition for Habeas Corpus relief. Petitioner filed an Application for a Certificate of Probable Cause, and, in an order filed October 19, 1979, said Application was granted by the District Court. On October 23, 1980, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court denying habeas corpus relief.

On September 25, 1980, the Supreme Court of South Carolina affirmed Petitioner's conviction in a *per curiam* memorandum opinion.

Petitioner currently remains incarcerated in the custody of the South Carolina Department of Corrections.

Statement of the Case

As indicated above, a preliminary hearing was held in the instant case, a mere eight days before trial, to determine whether probable cause existed on the initial three charges described above. At the hearing, the hearsay testimony of a single law enforcement officer was elicited. The magistrate found probable cause on all three charges and bound the case over to the Grand Jury. After the hearing was completed, the Solicitor informed Petitioner's counsel that the Grand Jury would be asked to return an indictment on a fourth misdemeanor charge, about which no evidence was presented during the preliminary hearing.

On the following Monday, May 14, 1979, the Grand Jury sitting in Greenwood County returned a four-count indictment against Petitioner charging him with the above-described offenses, as well as an additional count of conspiracy to commit assault and battery of a high and aggravated nature. The trial was scheduled to begin immediately. Defense counsel promptly moved for a continuance of the trial based both on the insufficiency of time to prepare Petitioner's defense and on the inability of Petitioner to obtain a fair and impartial jury in Greenwood County due to the flood of publicity surrounding the instant case and, most particularly, a series of extremely adverse articles concerning the Petitioner which had been published prior to arrest. The requests for continuance were made both by written motion filed on May 14, 1979, and by oral argument presented by defense counsel on that same day. (Tr. 55-57; 69-84).[1]

On Saturday, May 12, 1979, two days prior to the return of the indictment and the scheduled commencement of trial, Petitioner's trial counsel was informed of the existence of twenty-one hours of taped conversations allegedly involving

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[1] References are to the Transcript of Record filed in the Supreme Court of South Carolina.

the defendant, a federal government under-cover agent (about whose existence Petitioner learned for the first time on May 9, 1979) and others, which tapes were going to be utilized by the Solicitor in his case-in-chief. These tapes and more then three hundred pages of transcription of said recordings were furnished to defense counsel for the first time on Sunday afternoon, May 13, 1979. Defense counsel urged before the trial judge that an immediate trial date would not only prevent defendant and his counsel from testing the tape recordings for authenticity, and reviewing and analyzing the tapes in preparation for a defense to the offenses charged, but also would preclude any possibility of a proper investigation of the cause and the obtaining and preparation of witnesses. Counsel also urged that the pressures of an immediate trial date would prevent the defendant from having an opportunity to file all the necessary pretrial motions and evaluate additional discovery obtained pursuant to said motions. Counsel further stated that they had inadequate time in which to investigate the jury pool. (Tr. 69-84). The State opposed the request, informing the Court that it had worked late hours since Saturday night merely reviewing the tapes and transcripts to determine which portions it intended to introduce into evidence. (Tr. 75-79).

On May 14, 1979, Judge Moore granted a continuance to Wednesday, May 16th, at which time he would consider a further request for continuance, but denied a continuance to the next term of Court, commencing on June 18, 1979. (Tr. 84). On May 16, 1979, defense counsel, having barely been able to listen to the tape-recorded conversations one time, much less do the additional work required to adequately prepare the defense of the case, moved for an additional continuance of the trial date. The State again opposed the request for a continuance. The trial court ordered that the trial commence the following day, May 17, 1979, only three days after the return of the indictment. (Tr. 106-112).

With respect to the issue of pretrial publicity, on the day the defendant was indicted, defense counsel filed motions for an indefinite continuance because of "extensive adverse and inflammatory publicity . . . surrounding the case" (Tr. 55), for "additional peremptory challenges in jury selection" because of the extent of publicity (Tr. 59), and for individual *voir dire* of jurors by defense counsel also necessitated by the prejudicial publicity surrounding the case (Tr. 61). During the argument on said motions, defense counsel urged the trial court to continue the case until the inflammatory and adverse publicity subsided in order to insure the defendant a fair and impartial trial, pointing out the defendant's prominence in the area drew unusual and considerable attention to the case. (Tr. 71-84; 110-114). Several newspaper articles representative of the type of publicity surrounding the case were made part of the record. (Tr. 110-114). The State argued that the case had received massive media attention but claimed that none of the publicity was created by the State. (Tr. 77-78). Without commenting in any manner about the nature or extent of the pretrial publicity or ruling on whether it had a prejudicial effect on defendant's ability to obtain a fair trial, the trial court denied defendant's requests for a continuance. (Tr. 84; 114).

In a further effort to diffuse the impact of the adverse pretrial publicity, defense counsel urged the court to grant additional peremptory strikes and to allow him to conduct individual *voir dire* of each prospective juror. Such measures would, according to counsel, assist in obtaining a fair and impartial jury from a venire that had been exposed to the considerable publicity. The trial court denied defendant's requests commenting only that it felt it could not exceed statutory law in allowing peremptory challenges. (Tr. 103-104-A).

The publicity complained of in the case at bar, and represented by those newspaper articles made part of the record, appeared in every newspaper and on every television and radio station serving the Greenwood area (as well as other

areas of South Carolina and in other states) on a regular basis prior to trial and on virtually a daily basis from the date of the preliminary hearing. Prior to defendant's arrest on April 17, 1979, there appeared a four-day, front-page series in one of the two major newspapers serving the Greenwood community, *The Anderson Independent*, severely criticizing both the methods and motives of defendant's ministry. On April 18, 1979, the day following defendant's arrest, *The Anderson Independent* and both the *Index-Journal* and *Greenville News*, the other major area newspapers, reported with front page headlines the fact that the defendant had been jailed, the nature of the charges against him, alleged facts regarding the crimes charged as related by "authorities", and the fact that in 1978 defendant's "mansion" and his church in Ohio had been burned and dynamited, respectively, one week after a large insurance policy had been taken out by Jenkins (although the incidents had not been solved by state and federal law enforcement agents). In addition, the *Index-Journal* reported on the front page on April 18, 1979, that the Internal Revenue Service was interested in the manner in which defendant posts bond. On April 20th and 21st, 1979, the case was again reported in detail by the three newspapers.

Commencing on May 10, 1979, the day following the preliminary hearing, the case began to receive almost daily attention by the press, most often the subject of front page headlines. In a May 15th *Anderson Independent* article announcing that the defendant was indicted, the Solicitor was reported as stating in court that at least two parts of the tape would not be made public because they relate to "ongoing investigations." It is significant to note further that on the day trial commenced, May 17, 1979, the *Index-Journal* reported with front page headlines (as did the *Anderson Independent* on the following day) that the co-defendants had pled guilty and the Assistant Solicitor was reported to have commented that "no deal had been worked out with [the co-defendants] in exchange for their testimony."

On May 17, 1979, the first day of trial, the Solicitor announced, prior to jury selection but in open court with the entire jury venire present, that the co-defendants had each pled guilty. The single question remotely relating to potential prejudice resulting from pretrial publicity asked of the jury venire was:

> Is any juror sensible, that is, conscious of any bias, or has any juror formed any judgment in advance of hearing the evidence in this case? If so, please stand.

Because no prospective juror responded, the trial court presumably was satisfied that the jury venire was unbiased and untainted, and the jury was selected at random from this venire. (Tr. 153-154). Not a single question was directed to the jurors individually or as a group concerning whether they had read or heard publicity about the case and, if so, whether that publicity did or could affect their ability to render a judgment solely from the evidence presented at trial.

At the commencement of trial, defense counsel stated that the defense was present but not ready. (Tr. 151-152). During trial, the co-defendants who had pled guilty testified on behalf of the State. Numerous other witnesses appeared on behalf of the State, including a federal ATF agent who had inserted himself among Petitioner's associates, had tape-recorded Petitioner's conversations, and, as Petitioner maintained at trial, had initiated the notion of the commission of the crimes charged in the mind of the Petitioner. Several hours of the tapes were played at trial, despite the lack of time to test the tapes themselves and to evaluate which other portions of the recordings should be played for the jury other than those sections selected by the State. Due to the lack of preparation time, the defense only presented one witness in the Petitioner's defense, the Petitioner himself. On May 22, 1979, the jury returned a verdict of guilty on all four counts of the indictment.

Reasons for Granting the Writ

A. The Failure of the Supreme Court of South Carolina To Reverse Petitioner's Conviction Where the Defense Was Given Inadequate Time To Prepare Is Contrary to the Provisions of the Sixth Amendment's Guaranty to Effective Assistance of Counsel and the Fourteenth Amendment Due Process Guaranty.

While the Supreme Court of South Carolina chose not to state its reasons for affirming Petitioner's conviction, it is readily apparent that, with respect to the primary issue on appeal, *i.e.*, the denial of Petitioner's constitutional right to effective assistance of counsel, the Court relied on a series of its prior decisions relating to a trial court's discretion when confronted with a motion for continuance. The South Carolina court has consistently held that a motion for a continuance is addressed to the sound discretion of the trial judge and that the exercise of such discretion will not be disturbed on appeal in the absence of a clear and convincing showing of abuse of discretion with resulting prejudice to the defendant. *See, e.g.*, *State* v. *Greene*, 255 S.C. 548, 556, 180 S.E.2d 179, 183 (1971); *State* v. *Steadman*, 216 S.C. 579, 587, 59 S.E.2d 168, 172 (1950).

By so holding, the Supreme Court of South Carolina has completely ignored the constitutional implication of a denial of a continuance in cases such as the one at bar where the period between indictment and trial is miniscule and discovery and the case itself are sufficiently complex as to deny the defendant any realistic opportunity to prepare a defense. This Court, in *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932), recognized both that the Sixth Amendment right to effective assistance of counsel is a right possessed by defendants in state prosecutions through the Fourteenth Amendment's Due Process Clause and that assistance of counsel is not considered effective where counsel is provided insufficent time to prepare his defense.

This court has also noted that a balance must be struck between the discretion afforded a trial judge in the determination of whether to grant a continuance and a defendant's due process rights.

> [A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler* v. *Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva* v. *United States*, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415; *Torres* v. *United States*, 270 F.2d 252 (C.A. 9th Cir.); *cf. United States* v. *Arlen*, 252 F.2d 491 (C.A. 2d Cir.).

Ungar v. *Sarafite*, 376 U.S. 575, 589-590 (1964). *See also Sykes* v. *Virginia*, 364 F.2d 314, 316 (4th Cir. 1966) (defendants entitled to delay when necessary to enable attorneys to properly prepare for trial).

Clearly, the Supreme Court of South Carolina made no effort to weigh Petitioner's due process rights against the discretionary power of the trial judge to deny the continuance. The United States Court of Appeals for the Fifth Circuit has detailed the factors to be considered in this balancing process: (a) the amount of time available for preparation. (b) the likelihood of prejudice, (c) the accused's role in shortening the effective preparation time, (d) the degree of complexity of the case, (e) the availability of discovery from the prosecution, (f) the adequacy of the defense actually provided at trial, (g) the skill and experience of the attorney, (h) any preappointment or pre-retention experience of the attorney with the accused or the alleged crime, and (i) any representation of defendant by other attorneys that accrues to his benefit. *United States* v.

Uptain, 531 F.2d 1281, 1286-87 (5th Cir. 1987) (above considerations applied to state court proceedings to find denial of continuance deprived defendant of due process).

Had the South Carolina Court applied the *Uptain* test to the instant case, it would have realized that:

(a) The record reflects that a one-month period elapsed between arrest of the defendant and the commencement of trial; eight days transpired between the preliminary hearing and the trial, and only three days lapsed between indictment and trial. Clearly, the period between arrest and/or preliminary hearing and trial should not be given much weight in terms of designating it as preparation time because of several factors: (1) an entirely new count was added to the indictment which was not included in the warrant upon which the preliminary hearing proceeded; (2) Petitioner received no useful discovery from the preliminary hearing because only the hearsay testimony of a single law enforcement agent, not personally familiar with the facts of the case, was presented; (3) less than one day before the return of the indictment and four days before trial, defense counsel was presented with twenty-one hours of tape-recorded conversations and over 300 pages of transcript; and (4) Petitioner's lead counsel was hired sometime after the arrest, although prior to the preliminary hearing.

(b) The Petitioner was seriously prejudiced by the receipt of the tapes and transcripts less than four days before the trial commenced. Defense counsel was precluded from interviewing witnesses, preparing and presenting all pretrial motions, and adequately preparing for the direct and cross-examination of the single defense witness, the Petitioner himself. With respect to the tapes themselves, defense counsel admitted to having insufficient time to review them and, in fact, was compelled to accept for presentation to the jury those portions of the tapes selected by the State, having been faced with the single alternative of having the full twenty-one hours

played for the jury inasmuch as counsel was not given adequate time to select portions favorable to the defendant. Moreover, the record reveals that the defendant claimed the tapes contained alterations, an allegation that may have been supported had the defense been given an opportunity to test the original tapes.

(c) Petitioner had no role in shortening the effective preparation time.

(d) The case should be considered as complex as evidenced by the number of witnesses presented by the State (eleven), the nature and number of charges (two counts of conspiracy to commit arson and two counts to commit assault and battery, three counts alleging separate victims, and all relating to events covering a time span of more than seven months); and, most significantly, the nature of the State's primary evidence (numerous hours of surreptitious tape-recordings dating back to over a month before defendant's arrest). From the standpoint of preparation and investigation, the tapes and transcripts made defense counsel's job a highly complex one in the short period of time available for review and analysis.

(e) Meaningful discovery, *i.e.*, the tapes and transcripts, was presented to defense counsel less than four days before the commencement of trial, and, as previously noted, the time spent merely listening to the tapes prevented any other preparation.

(f) Lead defense counsel conceded before the Supreme Court of South Carolina that he had not afforded the Petitioner adequate assistance of counsel by virtue of the insufficiency of preparation time. The lack of time to prepare effectively foreclosed the presentation of any defense evidence except the testimony of the defendant himself. Lead defense counsel having had to delegate the responsibility of the presentation of the "defense", the Petitioner received substantially less than a unified defense. In essence, one hand did not know what the other was doing.

(g) Admittedly, Petitioner's chief trial counsel is both able and highly experienced in the trial of criminal cases. It is submitted, however, that the most experienced of counsel with any number of associates, if faced with the circumstances of the case at bar, would not have been able to afford this Petitioner adequate representation.

(h) See (a) and (i).

(i) While the Petitioner's original attorney participated in the trial of this case, with later retained counsel, only a month transpired between arrest and trial, and, during the bulk of that period, the Petitioner was not apprised of all the counts against him and was not provided with the tapes and transcripts which effectively obstructed any reasonable opportunity to adequately prepare a defense.

The cumulative effort of the above factors is a blatant denial of Petitioner's due process rights and his right to effective assistance of counsel. Accordingly, it is submitted that the trial court's arbitrary denial of a continuance was reversible error and the failure of the Supreme Court of South Carolina to recognize same should be reviewed by this Court.

B. The Failure of the Supreme Court of South Carolina To Reverse Petitioner's Conviction When Petitioner Was Denied a Trial by a Fair and Impartial Jury Is Contrary to the Provisions of the Due Process Clause of the Fourteenth Amendment.

The trial court below, faced with a trial in the relatively small town of Greenwood, South Carolina and an atmosphere clouded by pervasive and highly prejudicial publicity concerning the case and the defendant personally, took no steps, despite the urgings of defense counsel, to preserve for Petitioner his constitutionally guaranteed right to trial by a panel of indifferent and impartial jurors. *See Irvin* v. *Dowd*, 366 U.S. 717 (1961).

In the Statement of the Case, *supra*, the nature and extent of the pretrial publicity in the case at bar has been described. It should be emphasized the publicity not only involved the case coming to trial but, even more significantly, raised inferences that the Petitioner was responsible for crimes similar to those for which he had been indicted but for which he had never been charged, *i.e.*, the burning of his house and the dynamiting of his church in Ohio. Moreover, the publicity informed the public, including prospective jurors, of the alleged Internal Revenue Service interest in the Petitioner and alleged continuing investigation by State and Federal authorities. Further, the publicity indicated that the co-defendants had pled guilty and intended to testify, without a deal, against the Petitioner at trial, and that Petitioner had "engineered" the "plots" charged in the four conspiracy counts. Finally, the media criticized the Petitioner's ministry,[2] and created an adverse climate seized upon by the State in its cross-examination of the Petitioner.

The State's response to this prejudicial pretrial setting was not that the publicity was neither prejudicial nor massive but rather that the State was not responsible for engendering the publicity. The trial court's response to Petitioner's motions for an indefinite continuance, for additional peremptory strikes and for individual *voir dire* of prospective jurors was a denial of each motion and a *voir dire* that in no manner sought to determine jurors' exposure to, or bias resulting from, the pretrial publicity. The response of Supreme Court of South Carolina to Petitioner's attack on the trial judge's decision was to uphold the conviction without an explanation.

In *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-63 (1966), this Court stated that "*where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates* or transfer it to another county not so permeated with publicity."

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[2] Petitioner is a nationally known minister and clearly was Greenwood's most public figure.

(Emphasis added). The Supreme Court has further held that no actual prejudice need be shown to establish a trial atmosphere corrupted by publicity where "the influence of the news media . . . pervade[s] the proceedings." *Murphy* v. *Florida*, 421 U.S. 795, 798-99 (1975). It is submitted that the very nature and quantity of publicity in the instant case should have been sufficient, without a showing of actual prejudice, to cause the Supreme Court of South Carolina to reverse Petitioner's conviction.

The State Supreme Court did not, however, have to go that far. This Court has recognized that although a trial court has broad discretion in deciding what questions to ask, a searching *voir dire* is a necessary incident to the right to an impartial jury. *See Dennis* v. *United States*, 339 U.S. 162 (1950).

As noted in *Silverthorne* v. *United States*, 400 F.2d 627, 638 (9th Cir. 1968):

> The judge must insure that the *voir dire* examination of the jurors affords a fair determination that no prejudice has been fostered. *Aldridge* v. *United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). He must determine whether "the nature and strength of the opinion formed [if any] are such as in law necessarily * * * raise the presumption of partiality." *Reynolds* v. *United States*, 98 U.S. 145, 156, 25 L.Ed. 244 (1878).

In *Silverthorne*, a far more probing *voir dire* than was conducted in the case at bar was found not to "adequately dispel the probability of prejudice arising from the pretrial publicity and the jury panel members' knowledge of the case." *Id.* In the instant case, the limited *voir dire* afforded no opportunity for the trial court or the Supreme Court of South Carolina to determine whether Petitioner was prejudiced by the pretrial publicity and obtained an impartial jury, nor were any safeguards taken to secure the Petitioner a fair trial.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State,.....*Respondent,*
Leroy Jenkins,.....*Appellant.*

Appeal From Greenwood County
James E. Moore, Judge

Memorandum Opinion No. 80-MO-296
Filed September 25, 1980

AFFIRMED

F. Lee Bailey and Kenneth J. Fishman, both of Law Offices of F. Lee Bailey, of Boston, Massachusetts; and Hugh Beasley, of Beasley & Beasley, of Greenwood, for appellant.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes and Assistant Attorney General Kay G. Crowe, all of Columbia; and Solicitor William T. Jones, of Greenwood, for respondent.

Per Curiam: Appellant was convicted of two counts of conspiracy to commit arson and two counts of conspiracy to commit assault and battery of a high and aggravated nature. He was thereafter sentenced to four (4) consecutive five (5) year sentences, with each sentence to be suspended upon the service of three (3) years imprisonment and five (5) years probation.

After a careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis C.J.
s/ Bruce Littlejohn A.J.
s/ J.B. Ness A.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.

APPENDIX B

Constitutional Provisions

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Cases Involved	iii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Argument	
Question I	2
Question II	7
Conclusion	11

CASES INVOLVED

	PAGE
DeLee v. Knight, Sheriff of Dorchester County, 266 S.C. 103, 221 S.E.2d 844 (1975)	8
Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 66 L. Ed. 751 (1961)	8
Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)	8
Stanley v. State, 240 Ga. 341, 241 S.E.2d. 173 (1977)	6
State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1976)	9
State v. Cooper, 212 S.C. 61, 46 S.E.2d 545 (1948)	9
State v. Duckett, Memo Op. No. 755 (October 8, 1975)	5
State v. Flood, 257 S.C. 141, 184 S.E.2d 549 (1971)	6
State v. Fowler, 266 S.C. 203, 222 S.E.2d 497 (1976)	8
State v. Gidron, 211 S.C. 360, 45 S.E.2d 587 (1947)	9
State v. Mikell, 257 S.C. 315, 185 S.E.2d 814 (1971)	5
State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968)	5
State v. Smart, ___ S.C. ___, 262 S.E.2d 911 (1980)	6
State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966)	5
State v. Strauss, 114 S.C. 445, 103 S.E. 769 (1920)	5
State v. Swilling, 249 S.C. 541, 155 S.E.2d 607 (1967)	8
State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977)	4
United States v. Bobo, (4th Cir.) 477 F.2d 974 (1973)	6
Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973)	8

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PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The memorandum opinion of the South Carolina Supreme Court is Opinion Number 80-MO-296 (filed September 25, 1980). Said opinion will not be published.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I. Whether the Petitioner was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 3 and 14 of the Constitution of the State of South Carolina by the refusal of the trial court to grant Petitioner's trial counsel's motion for continuance, said motion being based on trial counsel allegedly having insufficient time to prepare a defense.

II. Whether the Petitioner was denied a fair trial and impartial jury, in violation of the provisions of the due process clause of the Fourteenth Amendment, by the refusal of the trial court to grant Petitioner's trial counsel's motions for additional voir dire and a continuance.

ARGUMENT

The State of South Carolina, in opposition to the Petition for a Writ of Certiorari in this matter, respectfully submits the following:

I.

The trial court was well within its discretion in denying Petitioner's motion for continuance based upon alleged inadequate defense preparation. (Petitioner's Question A)

Petitioner accurately sets forth the time sequence of events beginning with his arrest on April 17, 1979, pursuant to a warrant charging him with three (3) misdemeanor violations: two (2) charges of conspiracy to commit arson and one (1) count of conspiracy to commit assault and battery of a high and aggravated nature. On May 9, 1979, a full 22 days after Petitioner's arrest, a preliminary hearing was held wherein the State established probable cause to bind Petitioner over for trial. Subsequent to that hearing, Petitioner was informed that the grand jury would be asked to return an indictment on a fourth misdemeanor charge: conspiracy to commit assault and battery of a high and aggravated nature.

On May 14, 1979, five (5) days after having received such notice, indictments were returned on all four (4) counts by the grand jury and the case was called for trial by the State. At this time Petitioner's counsel, consisting of no less than four (4) experienced criminal trial attorneys, strenuously moved for continuance based upon alleged insufficient time to prepare for trial, as well as the existence of allegedly prejudicial pretrial publicity which Petitioner claimed would jeopardize his ability to receive a fair trial.

As to the former contention, it is noteworthy that Petitioner had filed and was prepared to argue numerous pretrial motions (i.e., Tr. pp. 55-62). Furthermore, counsel's sole reason propounded for justifying a continuance was the claimed inability to review 300 pages of transcripts of tape recordings of conversations between Petitioner, his codefendants and an undercover agent. These tapes constituted the vast bulk of the State's case, being in and of themselves overwhelming evidence of Petitioner's guilt. In fact, it is also noteworthy that Petitioner does not question the sufficiency of the evidence against him, thereby submittedly casting severe aspersion upon the merits of his claim that the jury verdicts were prejudiced to the extent that a different result might have been reached if a continuance had been granted. At any rate, the trial court did grant continuances amounting to three (3) additional days, the case being called for trial on May 17, 1979. At this time, counsel renewed the motion for continuance based upon the prior claim that, "we have not had the ability and the time necessary to sit and cogitate, and to confer and to analyze, and to let ideas incubate during this period of time so that we can properly prepare a defense for our client" (Tr. p. 108, line 22-p. 109, line 1).

Respondent deems it necessary to emphasize that Petitioner's sole claim prior to trial was that counsel had not had time to study the transcripts of State's evidence to their satisfaction. However, Petitioner has attempted to add other alleged grounds to bolster his present claim of ineffective assistance of counsel which were never alleged at trial, and certainly never demonstrated to the lower court. Respondent

respectfully submits that nothing in the Record supports Petitioner's present claim that he was denied the right to call witnesses in his behalf, other than himself, who would have been beneficial to his case. Of course, if such a claim had been made at trial, Petitioner would have had to comply with Circuit Court Rule 27 regarding motions for continuance on account of the absence of a witness before such a motion could have been granted. Since no such allegation or showing was propounded by Petitioner at trial, his injection of this issue on appeal is submittedly improper. Furthermore, Petitioner's contention that he was denied the services of his "lead trial counsel" on his direct examination, "presumably because lead counsel's preparation time was consumed with reviewing the tapes" is absolutely unsupported by the Record and, in any event, specious. Petitioner's claim that the trial court's denial of a continuance led to ineffective assistance of counsel because of "the inability of defendant's lead counsel, clearly the most experienced trial attorney among defendant's lawyers, to handle the defendant as a witness, because of his necessary devotion to other aspects of the case in an extremely limited time period, resulted in several highly objectionable questions on cross-examination remaining unchallenged", is one which has no basis in the Transcript of Record and hence is unworthy of consideration by this Court.

Of course, it is a well settled principle of law in South Carolina that the granting or refusal of continuance is within the discretion of the trial judge and its disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of Petitioner. Moreover, "when a motion for continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal." *State v. Vaughn,* 268 S.C. 119, 232 S.E.2d 328 (1977). Furthermore, Respondent respectfully submits that *Vaughn* is direct precedent for disposing of Petitioner's claim in the instant case:

> The Appellant advances the argument that a continuance should have been granted because the Solicitor was able to

> call the case for trial when he desired to do so, and, consequently, inadequate notice of the time for trial was provided. This argument is similar to that presented to us in *State v. Mikell,* 257 S.C. 315, 185 S.E.2d 814 (1971), where we rejected the contention. Likewise, we reject it in the instant case. The Appellant has not demonstrated anything that could have been used in his defense that was not employed by counsel. No showing is made of other evidence would could have been produced or additional points raised if a continuance had been granted. See *State v. Squires,* 248 S.C. 239, 149 S.E.2d 601 (1966). No showing of prejudice to the Appellant or abuse of discretion on the part of the trial judge has been made, and, accordingly, we overrule the exception.

The Court has, in fact, refused to disturb the trial court's ruling in cases in which counsel had only one day to prepare for trial. *State v. Duckett,* Memo. Op. No. 755 (October 8, 1975); *State v. Motley,* 251 S.C. 568, 164 S.E.2d 569 (1968); *State v. Strauss,* 114 S.C. 445, 103 S.E. 769 (1920).

As to Petitioner's sole ground properly reserved for review by the Court — that his four (4) able trial counsel were, in fact, unable to adequately study and analyze the tapes and transcripts of conversations in which he participated and had personal knowledge of — Respondent respectfully submits that the State had no duty to produce these tapes and transcripts in advance of trial at all. In fact, Respondent respectfully disagrees with Petitioner's contention that South Carolina law is relatively unclear as to whether a disclosure to the defense of recorded statements of a defendant is required as mandatory discovery. To the contrary, we respectfully submit that the Court made clear in *State v. Mikell supra,* that where the Solicitor, as here, was generous in sharing information which he had prior to trial, including tapes involving recorded conversations of the defendant, the denial of a defense motion for continuance which was based on the ground that recordings were not supplied them was not an abuse of discretion. As it did in *Mikell,* the Court continued to stand by the well settled rule that there is no right to discovery in a

criminal case. *State v. Smart,* ___ S.C. ___, 262 S.E.2d 911 (1980), *State v. Flood,* 257 S.C. 141, 184 S.E.2d 549 (1971). The Solicitor in the instant case, we respectfully submit, observed the true spirit of justice in supplying these tapes and transcripts in advance of trial. Furthermore, with the actual continuances granted by the trial court, four (4) capable trial counsel had a full four (4) days to study a mere 300 pages of record. It is noteworthy that these transcripts were utilized by defense counsel during the entirety of defense cross-examination of Agent Mirkin, and in fact several additional excerpts not offered by the State were utilized (Tr. pp. 518-658). We respectfully submit that counsel indeed demonstrated their familiarity with the transcripts. Petitioner has demonstrated absolutely no prejudice from his counsels' claimed lack of adequate time to study and "cogitate" upon them.

Regarding Petitioner's claim that these tapes had been tampered with, and that he had insufficient time to determine if such tampering had occurred, Respondent contends Agent Mirkin's testimony was consistent throughout that these tapes were precise recordings of conversations between he and the codefendants in the instant case. Respondent respectfully submits that these tapes were demonstrated to have been made by a device capable of recording interrogation, that the person operating the device was competent, and that they were preserved without alteration. Furthermore, they were identified by Agent Mirkin as having been made during the period of the conspiracy. Hence, we respectfully submit that they were properly introduced into evidence, and that Petitioner should be precluded from any speculation that he could have shown them to have been altered with more time prior to trial. *United States v. Bobo,* (4th Cir.) 477 F.2d 974 (1973); *Stanley v. State,* 240 Ga. 341, 241 S.E.2d 173 (1977).

Respondent respectfully submits that the instant case demonstrates substantial observance of Petitioner's right to a fair trial. Petitioner's contentions alleging otherwise are patently without merit.

II.

The trial court was well within its discretion in denying Petitoner's motion for continuance based upon allegedly prejudicial pretrial publicity. (Petitioner's Question B)

Petitioner claims that the trial court erred in failing to grant an indefinite continuance of his trial, as well as a change of venue *sua sponte,* due to alleged pretrial publicity which threatened his right to a fair and impartial trial by jury. Respondent respectfully submits that Petitioner has again injected allegations and issues into this exception on appeal which were not presented to the trial court, and in fact were undeniably waived. In the first place, during argument on Petitoner's motion for continuance, Petitioner was requesting only a continuance until the next term of court. It was specifically stated that, "we're not asking that this case be continued indefinitely." (Tr. p. 73, lines 11-11.) For Petitioner to now claim that the trial court should have granted an indefinite continuance when such was specifically not the subject of the actual motion made before the lower court is highly improper under any rule of appellate practice.

Respondent respectfully refers to the argument of counsel on Petitioner's motion for continuance wherein it was stated:

> And, Your Honor, putting aside those questions of rapidity with which my client has been thrust in this criminal justice system, there has been a great deal of what I would term adverse publicity surrounding this case. In the newspaper articles we have brought, and we have brought a number of newspaper articles here that we feel are representative of the type of press coverage that has been received, at least, today, we would suggest that in order for this period of furor to sort of quiet down, some continuance is in order. We are not requesting a change of venue. We, of course, suggested that the Solicitor alleges that these crimes were committed in Greenwood County, and Greenwood County is Reverend Jenkins' home, and this is where the case should properly be tried. However, I would submit that because of the inflammatory publicity surrounding this case, because

> of the status of Reverend Jenkins in the community, and that he is certainly a man of high visibility if anything he does is viewed, if Your Honor will, under a magnifying glass, that under these circumstances, this case should properly be continued. (Tr. p. 71, line 16-p. 72, line 10.)

Of course, it is well settled that the burden is on the moving party to show that prospective jurors have been prejudiced by pretrial publicity. As stated in *State v. Fowler,* 266 S.C. 203, 222 S.E.2d 497, 498-499 (1976):

> When an appellant alleges he was denied a fair trial due to pretrial publicity, normally he must show the jurors were aware of the publicity and that the publicity constituted legal prejudice. *State v. Swilling,* 249 S.C. 541, 155 S.E.2d 607 (1967). Moreover, recently we quoted applicable language from *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 66 L. Ed. 751 (1961) which states that mere exposure to adverse publicity does not automatically disqualify a prospective juror. 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' p. 1643 quoted in *DeLee v. Knight, Sheriff of Dorchester County,* 266 S.C. 103, 221 S.E.2d 844 1975.
>
> The surrounding circumstances and the impact of pretrial publicity at *the time of trial* is the focus of any inquiry concerning prejudicial publicity. Absent extraordinary circumstances, the ruling of the trial judge, developed through adequate voir dire examination of the jurors, that the objectivity of the jury panel has not been polluted with outside influence, will not be disturbed. *Wansley v. Slayton,* 487 F.2d 90 (4th Cir. 1973). The facts in the instant appeal are measurably different from the massive publicity and community hostility which occasioned reversal of convictions in *Irvin v. Dowd, supra* and *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Accordingly, this exception is overruled.

In his submittedly insufficient attempt to demonstrate that the trial court erred in denying his motion for continuance,

Petitioner alleges error on the part of the trial court in failing to ask any specific questions concerning pretrial publicity during his voir dire and, also, in the fact that said voir dire was conducted with the collective venire rather than individually. As to the former contention, Respondent respectfully submits that the trial court, in his ruling on Petitioner's motion for defense counsel to individually voir dire prospective jurors, ruled that it would consider any questions requested by Petitioner (Tr. p. 104-A, lines 9-23). However, a review of those questions asked after counsel had been invited to submit any questions indicates that no such questions were requested by Petitioner. Of course, it has been settled for many years that the trial court is not required to conduct any voire dire, including that mandated by statute, absent a request for such examination. *State v. Cooper,* 212 S.C. 61, 46 S.E.2d 545 (1948). As to any other questions not mandated by statute, it is also not error if the court on its own initiative fails to make such examination. *State v. Gidron,* 211 S.C. 360, 45 S.E.2d 587 (1947). Hence, the trial court satisfied his responsibility by propounding the question as to whether any juror was conscious of any bias or prejudice, or whether any juror had formed any judgment in advance of hearing the evidence in this case (Tr. p. 153, lines 18-21). Failure of counsel to request any further, and more specific questions concerning pretrial publicity involving Petitioner constitutes a waiver of any exception to such omission upon appeal.

Concerning Petitioner's present objection on this appeal that the trial court erred in refusing to conduct individual voir dire in the instant case, Respondent respectfully submits that this issue must be viewed in two particulars. There is no question that the trial court was requested, and refused to allow defense counsel to conduct individual voir dire. Respondent respectfully submits that this was entirely within his discretion and, in fact, it has been held by the State Supreme Court that the better practice is for the judge to conduct such examination. *State v. Britt,* 237 S.C. 293, 117 S.E.2d 379 (1976). Hence, we respectfully submit that the trial court's discretion in this regard should remain inviolate.

Presuming that Petitioner also contends on this appeal that the trial court erred in refusing to conduct individual voir dire itself, Respondent would first contend, again, that no request for or an objection to the failure of the trial court to conduct individual voir dire itself was ever made. (Tr. p. 104-A, lines 9-23; p. 152, line 13-p. 154, line 9.) Furthermore, none of Petitoner's exceptions specifically allege error in the trial court's refusal to conduct individual voir dire itself. Respondent contends that this is in patent disregard of Supreme Court Rule 4, Section 6 and constitutes a further waiver of this issue on appeal.

However, assuming this Court wishes to address the merits of the trial court's failure to conduct individual voir dire in the instant case, it appears that such issue, if properly objected to at trial and made the proper subject of a separate, concise and specific exception on appeal, has not been settled in South Carolina. The closest the Court has come to addressing the issue was in *Gidron, supra,* wherein it was stated:

> It appears that in some jurisdictions prospective jurors are examined as to their qualifications separately and in other jurisdictions collectively. This may be due to a difference in the applicable statutory requirements of the various states. In some jurisdictions it is error to refuse to allow individual examination. 31 Am. Jur. Jury, Section 105, p. 635; 50 C.J.S. Juries, Section 276 c. In this State, under the terms of [Section 14-7-1020 of the 1976 Code], it is the duty of the court, on motion of either party, to examine under oath the prospective jurors with respect to their competency. It is not error if the court on its own initiative fails to make such examination.
>
> It is unnecessary to now determine whether it would constitute reversible error to refuse a request for a separate examination of each juror on his voir dire. Certainly in capital cases it is the better practice to examine the jurors in this manner even though a separate examination is not requested. But in the instant case no request for a voir dire examination was made until after several jurors had already been drawn and accepted. The prospective jurors

thereafter drawn were separately examined. After the panel was completed, those who had not been previously examined under oath were sworn and the usual questions respecting their qualifications were propounded to them as a body.

The court inquired if this procedure was satisfactory and there was no response. Under these circumstances it is apparent that any right to a separate examination was waived.

Respondent contends that such waiver of any right to separate voir dire, if indeed one exists in this State, likewise occurred here. However, Respondent respectfully submits that this State is one wherein the rule has become well settled that the manner and extent of voir dire examination is within the discretion of the trial court; and that this discretion will not be reviewed absent a showing of abuse. Respondent respectfully submits no such showing has been made.

We respectfully contend that the trial court was well within its discretion in denying Petitioner's motion for continuance and, insofar as Petitioner's arguments regarding voir dire examination reflect upon that decision, we further contend that the trial court satisfied itself that the jury venire was unbiased and unprejudiced against Petitioner. Petitioner's exception alleging otherwise is without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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